Case Name: *Boswell, R (On the Application Of) v Secretary of State for Transport* [2024] EWCA Civ 145 (22 February 2024)

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Commentary:
This was an unsuccessful appeal by Dr Boswell ("the Appellant") against the decision by the High Court to dismiss the claim brought against the decisions by the Secretary of State for Transport ("SST") to grant development consent for three separate road improvement schemes to the A47 trunk road (collectively referred to as "Schemes" below). The key issue in the case was whether the SST had, in deciding to grant development consent for each of the Schemes, failed to discharge his obligation to examine and assess the cumulative greenhouse gas ("GHG") emissions likely to result from the Schemes.

Background

SST's obligations to assess the cumulative impacts of proposed schemes arises under The Infrastructure Planning (Environmental Impact Assessment) Regulations 2017. Each of the Schemes were subject to separate public examinations conducted by different planning inspectors ("the Inspectors"). The Inspectors recommended that development consent be granted for all three Schemes. The methodology outlined below was adopted for the assessment of GHG emissions from each of the Schemes.

The methodology

1. Emissions from the operation of the road was assessed using a traffic model based on the existing road and a wider network ("ARN").
2. The ARN assessment also considered the likely future developments in the area, including the two other Schemes (e.g. in the case of Scheme 1, the baseline included traffic growth from Schemes 2 and 3 on the assumption that they were implemented, and so on).
3. The carbon emissions from the ARN were calculated to produce baseline figures, which were referred to as a "Do Minimum" or "DM" scenario, and they represented a scenario where the scheme in question was not implemented, but the other two Schemes were.
4. Then, a "Do Something" or "DS" scenario was modelled, which assumed that all the Schemes were implemented.
5. Subtraction of the DM from the DS figures yielded estimates of the carbon emissions from each individual scheme alone, which were then compared with the three existing UK carbon budgets. The net change in carbon emissions resulting from the Scheme in question was then estimated as a percentage of the relevant UK carbon budgets. The percentages calculated for each of the Schemes were very small.

The environmental statements for each of the Schemes included a separate chapter on cumulative effects, which examined various environmental impacts. However, regarding carbon emissions, it was stated that the assessments and/or preceding chapters had already accounted for the cumulative impacts of carbon emissions.

Conclusions by the SST

The SST noted the concerns raised by the Appellant, as a part of the public examination process, as to whether a proper assessment into the cumulative impacts of carbon emissions was conducted; however, he agreed with the Inspectors that assessment of each scheme against national carbon budgets was an "acceptable cumulative benchmark". As a result, the SST concluded that the Schemes' contributions to the overall carbon levels were very low. He continued to explain that there is no single or agreed approach to assessing the cumulative impacts of carbon emissions and that he agreed with the Inspectors' conclusions that the assessment, provided by National Highways as per the above outlined methodology, can be deemed "inherently cumulative". The Court of Appeal noted that the IEMA Guidance (guidance issued by the Institute of Environmental Management and Assessment in 2022) provides clear and authoritative support to the SST's opinion that there is no defined boundary for assessing the impact of carbon emissions.

The crux of the issue raised by the Appellant was that the SST had only assessed the carbon emissions of each individual scheme against the national carbon budgets, as opposed to assessing the cumulative carbon emissions of all three Schemes against the carbon budgets.

Judgement

Two key points were noted by the Court of Appeal in its judgement.

First, the Appellant accepted that the SST did direct his mind to the question of cumulative GHG effects of the Schemes, therefore, the SST had before him, and must have considered, the forecast emissions from each of the three Schemes. Thus, the Court of Appeal concluded that each scheme was not viewed in isolation but was placed within a wider local context. This was further supported by the fact that the ARN was used in the assessment of carbon emissions of each scheme, which included emissions from the other two schemes.

Second, the Appellant did not challenge the crucial scientific fact that carbon emissions have no geographical boundary, thus their impact is not confined to the local area; in this regard they differ from other environmental impacts, such as noise and pollution. Where impacts are geographically confined it makes sense to consider them in conjunction with other similar impacts to see if their cumulative impacts may be greater

than the sum of the individual impacts measured in isolation. However, where the impacts are not geographically confined, as is the case for carbon emissions, the Court of Appeal held that it was logical for the SST to conclude that the only meaningful comparator for the cumulative effects of carbon emissions from each scheme was the national carbon budgets and not an arbitrary cumulation of projects. This was supported by the advice in the IEMA Guidance.

For the above reasons, the Court dismissed the appeal.

Case summary prepared by Chatura Saravanan